No. 12315

In the United States
Circuit Court of Appeals
For the Ninth Circuit Court

P. M. BARGER LUMBER CO., a corporation doing business under the name and style of Barger Millwork Company,

Appellant

vs.

J. L. WHITEHOUSE and INTERSTATE LUMBER SALES, INC.,

Appellees

Appellees' Brief

Upon appeal from the District Court of the United States for the District of Oregon

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KOKE-CHAPMAN CO., EUGENE, ORE.

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APPELLEES' STATEMENT OF THE CASE

At the time of the transaction in controversy the appellee Whitehouse was the successor in interest to Austin Dodds Lumber Co., and was engaged in the business of buying and selling lumber and lumber products as a wholesaler or wholesale lumber dealer. The Appellee had his principal place of business in Eugene, Oregon. F. M. Lytle was employed by the Appellee as a lumber finder. F. M. Lytle's office was in Portland,

Oregon. (R-133, 134, 139). (These facts are admitted).

At the same time Ruth Meyer, not a party to this proceeding, also was engaged in the business of buying and selling lumber and lumber products as a wholesaler or wholesale lumber dealer. Her office was in Portland, Oregon. (The Appellant denies that Ruth Meyer was a wholesale lumber dealer.)

The carload of doors involved in the controversy was ordered and obtained in the following manner: On January 10, 1948, F. M. Lytle received a telephone call from Ruth Meyer asking for doors (R-136). Mr. Lytle indicated he had or could obtain a carload of doors. On the same day Ruth Meyer called back and ordered the doors (R-137, 144); Ruth Meyer confirmed her order by a letter received by Mr. Lytle on January 11, 1948 (R-137). The telephone order was relayed by phone to the Eugene office of the appellee Whitehouse who, in turn, sent an order, by wire, to Grant Manufacturing Co., Del Paso Heights, California (R-164). On January 12, 1948, the carload of doors was enroute to the destination in North Carolina requested by Ruth Meyer as evidenced by the Grant Manufacturing Co. invoice to Austin Dodds (Exhibit Q, R-165, 46). (None of these facts appear to be disputed).

Payment for the doors was made as follows: The California manufacturer drew a sight draft on Austin

Dodds Lumber Co., with invoice and order bill of lading attached, and sent it to The First National Bank of Eugene, Oregon (Exhibit R, R-165, 175, 176, 179). The draft was paid by appellee Whitehouse on January 15, 1948 (R-179). The Appellee then drew a draft on Ruth Meyer, Bank of California, Portland, Oregon, and attached to it a bill of lading from the Appellee and the endorsed order bill of lading from the California manufacturer. The draft with the attached bills of lading was then deposited in The First National Bank of Eugene, Oregon, for collection. (R-174, 175) The Eugene bank gave credit to the Appellee for this draft on January 19, 1948 (R-181). Ruth Meyer then attached the order bill of lading to her own invoice to the Appellant (R-54). Ruth Meyer was paid by the Appellant. (None of these facts appear to be disputed).

One of the questions presented to the trial court by the pre-trial order and the evidence was whether any contractual relationship ever existed between the Appellant and the Appellees which would give the Appellant a cause of action against, or a right to sue, the Appellees.

The trial court found that Ruth Meyer was a wholesale lumber dealer and that Ruth Meyer purchased the doors in controversy in her capacity as an independent wholesale lumber dealer, and not as an agent for the

Appellant (Finding of Fact No. VII. R-14). From these findings the trial court concluded that the transaction between appellee Whitehouse and Ruth Meyer was a separate independent transaction complete in itself, and that no contractual relationship of seller and buyer, or other contractual relationship, existed at any time between the Appellant and either of the Appellees with reference to the doors in controversy (R-15).

QUESTION INVOLVED ON APPEAL

Is there any substantial evidence to support the Findings of Fact made by the trial court, particularly Finding of Fact No. VII (R-14) ?

ARGUMENT

I

FINDINGS OF FACT BY A TRIAL COURT IN AN ACTION WHICH WOULD BE CONSIDERED AN ACTION AT LAW UNDER THE COMMON LAW WILL NOT BE SET ASIDE BY AN APPELLATE COURT IF THERE IS ANY SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDINGS.

This controversy was an action tried upon the facts by the court without a jury. *Rule* 52 (*a*) *of the Federal Rules of Civil Procedure,* 28 U.S.C.A., following Sec-

tion 723c applies. This rule states, in part, "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

The Appellant's brief appears to be based upon the assumption that the Appellate Court under Rule 52(a) will view this appeal, in an action for damages, in the same manner that it views cases in equity and in admiralty. A similar contention was rejected in *Western Union Telegraph Co.* v. *Bromberg* (C.C.A. 9th, 1944) 143 F. (2d) 288, 290 by the following language:

> "The main contention made by appellant is that Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, requires this court to view this appeal in the same manner that it views cases in equity and in admiralty. . . .
> ". . . . . The rule does not disturb the long followed principle that the judge or jury which has seen and heard the witnesses is better qualified to weigh their testimony than is a reviewing tribunal and that findings of fact of the trial body will not be set aside unless clearly erroneous. Appellate Courts are, however, free to draw inferences and conclusions from findings of fact. See Kuhn v. Princess Lida of Turn & Taxis 3 Cir. 1941, 119 F (2d) 704, 705, 706."

In *Kuhn* v. *Princess Lida of Thurn & Taxis* (C.C.A. 3rd, 1941) 119 F. (2d) 704, 705, cited in the above decision by the Ninth Circuit, the Court stated, on page 705:

> ". . . . . The reason for the rule rests in a large part upon the fact that the trial judge who hears

> the witnesses testify and observes their demeanor upon the stand is better qualified to appraise the credibility of their testimony and to resolve the conflicts therein. So long, therefore, as a finding of fact is supported by evidence and is not clearly erroneous, it is to be accepted on appeal as verity."

Under Rule 52(a) the Appellate Court does not attempt to pass upon the evidence de novo, to weigh the evidence, or to settle conflicts therein, or to consider the credibility of witnesses:

> "We do not understand that the foregoing rule has enlarged the discretion of this Court in passing upon the probative force of evidence. Our function is to review the finding of the lower court and not to pass upon the evidence de novo. We cannot say that a finding of the fact of prior use is "clearly erroneous" merely because we might have entertained some doubt about the quantum of evidence. We must attach to the testimony of the witnesses the full weight and quality of credibility which the trial court gave it."
>
> *Webb* v. *Frisch* (C.C.A. 7th, 1940) . . . . 111 F. (2d) 887

> "In the application of Federal Rule 52 it is the following principle that guides this Court: the reviewing court does not review the evidence as an original fact finding tribunal; it does not attempt to settle conflicts in evidence or to determine questions of credibility. . . . . Whether special findings are supported by the evidence or whether they give the requisite support to conclusions rendered thereon, are questions open to consideration here."
>
> *Campana Corporation* v. *Harrison* (C.C.A. 7th, 1940) 114 F. (2d) 400, 405)

"The question for decision in this case is whether there is sufficient basis in the evidence for the court's findings of fact. In deciding that question we are required to take that view of the evidence which is most favorable to the appellees."

". . . . . The findings of fact of the trial judge are not clearly erroneous unless unsupported by substantial evidence, or clearly against the weight of the evidence, or induced by an erroneous view of the law. 'This Court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court. * * * The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly.' Cleo Syrup Corporation v. Coca Cola Co., 8 Cir., 139 F. (2d) 416, 417, and cases cited."

Smith v. *Porter* (C.C.A. 8th, 1944)
143 F. (2d) 293, 294, 295

". . . . . We have to determine only whether the finding of the trial court is clearly erroneous. The finding is not clearly erroneous if there is substantial evidence to support it. We consider only the evidence that supports the court's finding. We do not weigh the evidence or resolve any conflicts therein, or consider here the credibility of the witnesses."

Fox River Paper Corporation
v. *United States* (C.C.A. 7th, 1948)
165 F. (2d) 639, 640

The above quoted decisions were in cases which would be classed as law actions at common law. These cases and numerous others have established the rule that findings of fact made by a trial court on waiver of a jury in an action which under the common law would

be considered to be a law action will not be considered clearly erroneous if there is any substantial evidence to support the findings.

The only case which counsel for the Appellees have found involving a finding of fact by the court on the existence of an agency relationship was a case in equity entitled *Blum* v. *William Goldman Theatres, Inc.* (C.C.A. 3d, 1947) 164 F. (2d) 192. This was an action to compel conveyance of property and it is interesting and pertinent to the present appeal to notice the attitude of the appellate Court toward a finding of fact by the trial court in an equity case. On page 196 of the reported decision the following language appears:

> "Considerable attention was devoted at the trial to the question whether Friedmann was Blum's agent. After careful consideration, the trial court found as a fact that Friedmann was not. It is not for us to decide whether we would reach the same conclusion had we been the original triers of fact. . . . . There being sufficient evidence to support that finding of fact, we are not disposed to weigh the testimony anew."

II

THE FINDINGS OF FACT MADE BY THE TRIAL COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The record discloses the existence of substantial evidence to support the findings of the trial court that the doors in controversy were purchased from the ap-

pellee Whitehouse by Ruth Meyer in her capacity as an independent wholesale lumber dealer, and not as an agent for the Appellant, and that no contractual relationship existed at any time between the Appellant and either of the Appellees.

By the customs and usages of the lumber business in the Northwest trade area a wholesaler is not an agent, but he is one who buys and sells and invoices for himself, for his own account (R-116, 117, 152, 154). Under the same customs and usages a commission man is one who acts as an agent for the producer or the customer (R-152); a commission man or agent does not invoice, and when a sale is made through a commission man or agent the customer in invoiced directly by the seller (R-152, 118); ordinarily, when dealing with a commission man, the customer pays the shipper directly (R-153); and the commission man receives his commission from the person for whom he acts as agent (R-118, 152, 153).

Ruth Meyer was described as a wholesale lumber dealer on her stationery and purchase orders (R-137). She was listed as a wholesaler in the Lumberman's Red Book, a credit service publication for the lumber industry (R-191). Ruth Meyer was known to the appellee Whitehouse to be a wholesaler or wholesale lumber dealer and he dealt with her as a wholesaler (R-168,

181, 191). Other persons in the lumber business dealt with and sold to Ruth Meyer on an independent completed transaction basis (R-123). The doors in controversy were sold to Ruth Meyer (R-180, 209); Ruth Meyer was invoiced directly (R-54, 209); Ruth Meyer paid for the doors and received title to the doors (R-181); and Ruth Meyer invoiced the Appellant (R-54).

A copy of the written purchase order, dated January 12, 1948, from Ruth Meyer to appellee Whitehouse (Exhibit 3, R-52, 48, 145) has the word "Agent" typewritten upon it (R-50). Before this order could have been received by appellee Whitehouse the carload of doors had been purchased under an agreement that they were sold to Ruth Meyer and they were on their way to their destination (R-46, 49, Exhibit 6, R-165). In prior purchase orders sent to appellee Whitehouse Ruth Meyer had never used the word "Agent" (R-123) and it was not used in subsequent orders (R-138). Mr. Brackensick testified that he had never seen the word "Agent" on any purchase orders from Ruth Meyer (R-123).

The Appellant's own testimony is inconsistent with its contention that Ruth Meyer was acting as an agent and not as an independent wholesale lumber dealer. Cecil Barger, the manager of Barger Millwork Company and an officer of the appellant corporation was

the only witness for the Appellant. Mr. Barger indicated that he considered persons in Ruth Meyer's situation to be middlemen, making a profit through an intermediate markup (R-80, 82). A middleman with a markup profit is inconsistent with and not found within a principal and agent relationship. Through Mr. Barger's testimony it was revealed that the Appellant had no knowledge of the price Ruth Meyer was paying for the doors, it was interested only in the price at which she would sell (R-83); the amount of Ruth Meyer's commission or profit was not considered to have any direct effect on the appellant (R-84); it would have made no difference to the Appellant if Ruth Meyer sold the particular carload of doors she was talking about to someone else so long as the Appellant received a similar car (R-84, 85), and where Ruth Meyer got the doors was of no particular interest to the Appellant (R-94). These statements are contrary to the concept of agency and indicate that the Appellant was making a purchase from Ruth Meyer and not from someone else through Ruth Meyer.

CONCLUSION

This case on appeal is definitely within Rule 52 (a) of the Federal Rules of Civil Procedure and the interpretations thereof cited and quoted in this brief. The trial judge saw and heard the witnesses testify; he ob-

served their demeanor and he was in a position to appraise the credibility of their testimony and to resolve any conflicts in the testimony submitted. In addition to these unrecorded factors the record before this Court clearly shows the existence of substantial evidence to support the findings of fact made by the trial court. We submit that the findings of fact should not be disturbed, and that the judgment of the trial court should be affirmed.

Respectfully submitted
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